

United States District Court  
For the Northern District of California

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IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

ALEXANDER ALPER,

Plaintiff,

No 03-2480 VRW

v

ORDER

JO ANNE B BARNHART,  
Commissioner of Social Security,

Defendant.

/

This social security appeal under 42 USC § 405(g) presents the issue whether, under the Social Security Administration's (SSA's) regulation at 20 CFR § 416.1130(b), an arrangement in which unrelated co-tenants share an apartment's market-rate rent unevenly between them constitutes a grant of in-kind support and maintenance (ISM) income by the tenant who pays more in favor of the tenant who pays less. Plaintiff's disabled status is not at issue.

Plaintiff Alexander Alper appeals a decision by the SSA's Appeals Council holding that because his rent-sharing agreement with his roommate is not a "business arrangement," he is deemed to receive ISM income equaling the difference between half of the total

1 rent and his actual contribution. The financial impact of the  
2 decision was a reduction of approximately \$200 per month in  
3 plaintiff's supplemental security income (SSI) benefits.  
4 Administrative Record (AR) Doc #20 at 5-6, 30. The parties have  
5 filed cross-motions for summary judgment. Doc ## 22, 23.

6

7 I

8 Plaintiff, a disabled Russian immigrant, knew Sofya  
9 Akselrud in Moscow before they both immigrated to the United States.  
10 AR 27. The two did not initially keep in touch after moving to the  
11 United States. Id. When plaintiff first immigrated from Russia, he  
12 lived in California with his mother and brother. AR at 65. After  
13 they both died, plaintiff decided to leave California. Meeting  
14 Akselrud again during a visit to New York, he decided to move in  
15 with her. AR 27. Plaintiff could not otherwise afford the  
16 expensive housing in New York and Akselrud was reportedly  
17 "satisfied" with the arrangement. Id. While in New York, plaintiff  
18 paid less than half of the total rent — \$450 out of \$1050 in total  
19 rent — but paid for his share of utilities and his own food,  
20 clothing and other expenses. AR 65-66. In New York, he received a  
21 full award of SSI benefits. AR 66.

22 In May 2002, plaintiff and Akselrud both moved to  
23 California and after a search, rented a one-bedroom apartment in San  
24 Jose from AvalonBay Communities, Inc (AvalonBay). Id. The lease  
25 required that all persons eighteen years of age or older who would  
26 be residing at the apartment be listed and sign the lease. AR 41.  
27 Both plaintiff and Akselrud signed the lease, thus becoming jointly  
28 and severally liable for the rent. AR 41-43. The total rent was

1 \$1405, out of which plaintiff paid \$500 to the landlord and Akselrud  
2 \$905. AR 15, 38, 41. Plaintiff also paid about \$50 toward  
3 utilities. AR 28, 38, 47. Plaintiff paid for his own food,  
4 clothing and other expenses. AR 38. Plaintiff and Akselrud did not  
5 have a "formal agreement" between them. AR 26.

6 On June 24, 2002, plaintiff filed with the SSA a statement  
7 to determine continuing eligibility for SSI payments in which he  
8 stated that he lived in an apartment, shared a household with his  
9 non-relative roommate and paid \$500 of the monthly rent of \$1405 and  
10 \$50 toward utilities. AR 37-38. He also stated that he bought his  
11 own food separately from Akselrud. Id. Based on this statement,  
12 the SSA determined that plaintiff was receiving ISM income from  
13 Akselrud and reduced his monthly SSI benefit from \$750.00 to  
14 \$568.34. AR 12. Plaintiff timely requested reconsideration, AR 47,  
15 but the SSA affirmed its decision to reduce benefits. AR at 58.  
16 Plaintiff then made a timely request for a hearing before an  
17 administrative law judge (ALJ). AR 63.

18 The ALJ held a hearing on December 11, 2002 at which  
19 plaintiff appeared with his attorney and a translator. AR 23. At  
20 the hearing, plaintiff testified that he and Akselrud decided to  
21 continue living together in California because "she couldn't find  
22 the apartment — any housing cheaper," AR 28, that he and Akselrud  
23 had been unable to afford a two-bedroom apartment and instead  
24 decided to rent a one-bedroom apartment for which Akselrud would pay  
25 \$900 and plaintiff would pay \$500. AR 26. Plaintiff testified that  
26 while they were both satisfied with the arrangement, he would prefer  
27 cheaper subsidized housing and was trying to obtain it. AR 29-30.  
28 Plaintiff further testified that Akselrud paid the water bill while

1 he paid the electricity bill, and that he paid for his own food and  
2 clothing. AR 28.

3 On January 30, 2003, the ALJ issued a favorable decision  
4 finding that a "business arrangement" within the meaning of 20 CFR §  
5 416.1130(b) existed between plaintiff and Akselrud and that  
6 plaintiff was therefore not receiving ISM income from his roommate.  
7 AR 16. Relying on dictionary definitions of the term "business,"  
8 ALJ found that a "business arrangement" existed because "[w]hen two  
9 or more people make an arrangement for housing to their mutual  
10 financial advantage, they are clearly engaging in 'activity for  
11 gain, benefit, or advantage,'" — that is, business — and the  
12 living arrangement was "an agreement mutually advantageous to both."  
13 AR 13. The ALJ commented that the regulations' explanation of when  
14 a "business arrangement" exists was "straightforward" and did not  
15 require that rent be paid in equal shares or impose other burdens  
16 not specifically stated, only that "the amount of monthly rent  
17 required to be paid equals the current market rental value." AR 13.

18 The ALJ further commented that "SSA living arrangement  
19 determinations often appear to rely on an invalid perception or  
20 interpretation of the law," often mandating pro rata share  
21 requirements that appear "arbitrary and without legal authority."  
22 AR 14. The ALJ reasoned that a pragmatic approach was instead  
23 necessary to carry out the purposes of Title XVI:

24 Financial reality should be the principal  
25 consideration in making determinations about living  
26 arrangements. Individuals attempting to live on an  
27 SSI budget must make creative arrangements for  
28 housing and other essentials. There is nothing in  
the record which indicates that the claimant and Ms  
Akselrud did not engage in an arms-length  
negotiation regarding housing and arrive at the  
bargain described. That this arrangement is a

1 hybrid requiring Mr Alper to pay what amounts to a  
2 lesser portion of the monthly rent does not negate  
3 the fact that he is paying a flat fee for room.  
4 This business arrangement requires that the  
5 claimant pay a not insubstantial amount for room  
and an additional amount for other expenses.  
Moreover, the amount paid by Mr Alper (\$500  
monthly) is similar to what an individual might pay  
to rent a room in the area.

6 AR 14. In support of the latter finding, the ALJ relied on the  
7 classified advertisements in the local San Jose newspaper. AR 16.  
8 The ALJ determined that the SSA's approach was not consistent with  
9 the statute or its regulations:

10 Had Congress intended to impose an onerous burden  
11 of proof on claimants who have made arrangements to  
12 secure affordable housing, it would have stated  
13 this intent in the statute \* \* \*. Nor is there any  
14 part of the law or regulations supporting the  
15 notion that individuals not fortunate enough to  
find lodging in low-income housing should be  
deprived of a portion of their meager SSI payment  
because the housing arrangements they have made are  
perceived as not meeting some POMS guideline or  
'policy' statement.

16 AR 15. The ALJ concluded that plaintiff's living arrangement fell  
17 within the business arrangement criteria of 20 CFR § 416.1130(b)  
18 and ordered his benefits revised accordingly. Id.

19 In response to a memorandum from the San Francisco  
20 regional office on March 25, 2003, the SSA's Appeals Council  
21 elected to review the ALJ's decision. AR 5. In a brief decision  
22 dated May 12, 2003, the Appeals Council concluded that the ALJ had  
23 applied 20 CFR § 416.1130(b) incorrectly. Id. The Appeals Council  
24 set forth its reasoning thusly:

25 [t]he record does not indicate that the claimant is  
26 renting a room from Sofya Akselrud in her apartment  
27 under a business arrangement, or under any other  
arrangement, or that the claimant is paying her any  
rent. Rather, the record establishes that the  
claimant and Ms Akselrud are joint tenants in an  
apartment owned by AvalonBay Communities, Inc. \* \* \*

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1 Presumably, [the monthly rent] equals the current  
2 market value of the apartment. Thus the claimant \*  
3 \* \* has a "business arrangement" only with AvalonBay  
4 Communities, Inc., and receives no in-kind support  
5 and maintenance from AvalonBay Communities. [sic]  
6 Inc. in accordance with 20 CFR 416.1130(b).

7 AR 5-6. The Appeals Council next discredited the plaintiff's  
8 assertion that he paid a portion of the utilities, stating that  
9 there was "no evidence corroborating" such payments. AR 6.  
10 Accordingly, the Appeals Council then reasoned that "the claimant's  
11 portion of the household shelter costs [rent plus utilities] is  
12 \$727.50 per month (\$1455.00 divided by 2) and the record documents  
13 that he pays only \$500.00 per month, \* \* \* the difference, \$227.50,  
14 is in-kind support and maintenance" from Ms Akselrud. AR 6. The  
15 Appeals Council ordered plaintiff's benefits reduced the maximum  
16 monthly amount allowed under 20 CFR 416.1140 — \$201.66 for 2002  
17 and \$204.00 for 2003.

18 Plaintiff filed this timely appeal seeking judicial  
19 review of the Appeals Council's decision.

## II

20 Under 42 USC § 405(g), a decision to deny benefits may be  
21 overturned if the decision is not supported by substantial evidence  
22 or if the decision is based on legal error. Thomas v Barnhart, 278  
23 F3d 947, 954 (9th Cir 2002). "Substantial evidence means more than  
24 a scintilla but less than a preponderance." Id. "Substantial  
25 evidence is relevant evidence which, considering the record as a  
26 whole, a reasonable person might accept as adequate to support a  
27 conclusion." Id. The Appeals Council's decision constitutes the  
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1 SSA's final decision and is the sole subject of review on this  
2 appeal. Taylor v Heckler, 765 F2d 872, 875 (9th Cir 1985).

3 Under Title XVI of the Social Security Act, blind, aged  
4 or disabled individuals are eligible to receive SSI benefits based  
5 on need, as determined from each individual's total income. See 42  
6 USC § 1381(a). "Income" is defined as anything that a recipient  
7 receives in cash or in kind that can be used to meet the  
8 recipient's needs for food, clothing and shelter. 20 CFR §  
9 416.1102. The regulation defines ISM as

10 any food or shelter that is given to you or that you  
11 receive because someone else pays for it. Shelter  
12 includes room, rent, mortgage payments, real  
property taxes, heating fuel, gas, electricity,  
water, sewerage, and garbage collection services.

13 20 CFR § 416.1130(b). Section 416.1130(b) further states that a  
14 recipient is not receiving ISM income in the form of rent if the  
15 recipient is "paying the amount charged under a business  
16 arrangement." A "business arrangement" exists where the amount of  
17 monthly rent required to be paid "equals the current market rental  
18 value" of the recipient's accommodations. See § 416.1130(b). The  
19 regulations define "current market value" as "the price of an item  
20 on the open market in your locality." 20 CFR § 416.1101.

21 In nearly all federal judicial circuits including the  
22 Ninth, 20 CFR § 416.1130(b) provides that if the SSI recipient's  
23 actual rent is not equivalent to the current market rental value of  
24 his accommodations, there is no "business arrangement" and the  
25 recipient is deemed to be receiving ISM income in the form of rent.  
26 (Under an alternate rule applicable only in the Seventh Circuit, if  
27 the amount of rent the recipient is required to pay is not  
28 equivalent to the presumed maximum value of the accommodations,

1 there is no "business arrangement.") Once a recipient is found to  
2 be receiving ISM income, the regulations require determination of  
3 whether the recipient resides in his own household or the household  
4 of another and benefits are reduced accordingly. 20 CFR § 1130(c).  
5 If the recipient is determined to be living in the household of  
6 another who provides the beneficiary with food and shelter,  
7 benefits are reduced by one-third. *Id.* If the recipient lives in  
8 his own household, the "presumed value rule" requires a reduction  
9 of at a presumed "maximum value" of benefits according to a  
10 specific formula; the claimant may seek exemption from the presumed  
11 value rule by presenting evidence that the value of ISM received is  
12 lower than the presumed value. 20 CFR § 416.1140.

13

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### III

15 Plaintiff challenges the Appeals Council's decision that  
16 he was not paying rent pursuant to a "business arrangement,"  
17 arguing that (1) the Appeals Council's factual finding of no  
18 "business arrangement" was not supported by substantial evidence;  
19 or, alternatively (2) the Appeals Council interpreted the  
20 regulation's use of the term "business arrangement" in a manner  
21 contrary to the governing statute. *Pl Reply* (Doc #25) at 2-3.

22

23 Federal courts generally defer to an agency's reasonable  
24 interpretation of its statute and regulations. *Campbell ex rel*  
*Campbell v Apfel*, 177 F3d 890, 893 (9th Cir 1999); *Chevron USA, Inc*  
*v Natural Resources Defense Council, Inc*, 467 US 837, 842 (1984).  
25  
26 "[P]rovided an agency's interpretation of its own regulations does  
27 not violate the Constitution or a federal statute, it must be given  
28 'controlling weight unless it is plainly erroneous or inconsistent

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1 with the regulation.'" Stinson v United States, 508 US 36, 45  
2 (1993) (quoting Bowles v Seminole Rock & Sand Co., 325 US 410, 414  
3 (1945)). This deference does not, however, amount to a judicial  
4 rubber-stamp of the agency's interpretation.

5 The existing jurisprudence around 20 CFR § 416.1130(b)  
6 interprets whether an SSI recipient is receiving ISM income in one  
7 of two factual scenarios not present in this case. One category of  
8 cases considers whether the difference between the market-rate rent  
9 and the rent actually charged to an SSI recipient by a landlord who  
10 is a relative constitutes ISM income. See Antoniolli v Harris, 624  
11 F2d 78 (9th Cir 1980) (difference between property taxes paid by SSI  
12 recipient on behalf of landlord-relative and market rate rent for  
13 the dwellings deemed ISM income); Jackson v Schweiker, 683 F2d 1076  
14 (7th Cir 1982) ("business arrangement" found between claimant and  
15 landlord-relative when rent charged equaled such a large percentage  
16 of federal benefits the claimant derived no "actual economic  
17 benefit" by the arrangement); Ruppert v Bowen, 871 F2d 1172 (2d Cir  
18 1989) (adopting the Jackson "actual economic benefit" analysis in  
19 like factual scenario); Ragsdale v Apfel, 999 F Supp 814 (EDVA 1998)  
20 (applying the Jackson "actual economic benefit" test to find  
21 married SSI recipients not receiving ISM from their landlord-son  
22 when the difference between the market-rate rent and rent actually  
23 paid provided the SSI recipients with no actual economic benefit).

24 The second category of cases applying 20 CFR §  
25 416.1130(b) considers whether payment of a portion of a SSI  
26 recipient's market rate rent by a third party who is not a co-  
27 tenant constitutes ISM income. See Ellis v Apfel, 147 F3d 139 (2d  
28 Cir 1998) (no "business arrangement" found where an unrelated third

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1 party not living on the premises or obliged to pay rent paid a  
2 portion of the SSI recipient's rent); Hecht v Barnhart, 217 F Supp  
3 2d 356 (EDNY 2002) (disbursements from SSI recipient's Supplemental  
4 Needs Trust to pay room and board constituted ISM); but see  
5 Beckless v Chater, 909 F Supp 575 (ND Ill 1995) (third party's  
6 partial payment of market-value rent was not ISM where the amount  
7 of rent paid by the SSI recipient exceeded the presumed maximum  
8 value of the apartment).

9 The court has found no published opinion addressing 20  
10 CFR § 416.1130(b)'s applicability where, as here, unrelated co-  
11 tenants have agreed to split a market rate rent unevenly between  
12 them. For the reasons stated below, the court concludes after  
13 careful review that the Appeals Council's interpretation of 20 CFR  
14 § 416.1130(b) is clearly erroneous and requires remand to correct  
15 an interpretation that imposes additional burdens on claimants that  
16 are not explicitly or implicitly required by the regulation and are  
17 contrary to the intent of Title XVI of the Social Security Act.

18 First, the Appeals Council interpreted the "business  
19 arrangement" exception to § 416.1130(b) as potentially existing  
20 only between a claimant and a landlord or other entity to whom the  
21 claimant pays rent. It found that, because plaintiff "and Ms  
22 Akselrud are joint tenants in an apartment owned by AvalonBay" and  
23 the amount of rent paid "equals the current market value of the  
24 apartment," plaintiff has a "business arrangement" only with  
25 AvalonBay. AR 5-6. The logical underpinning of this syllogism is  
26 not apparent to the court.

27 Second, the Appeals Council decision concluded that  
28 plaintiff was receiving ISM because he paid less than half of the

1 total household expenses. This conclusion rested on the implicit  
2 assumption that if two people inhabit the same apartment, the  
3 current market value of each individual's shelter can only be  
4 exactly half of the total rent. Based on its finding that "the  
5 claimant's portion of the household shelter costs is \$727.50 per  
6 month (\$1455.00 divided by 2) and the record documents that he paid  
7 only \$500 per month \* \* \* the difference, \$227.50, is in-kind  
8 support and maintenance under 20 CFR 416.1121(h) and 416.1141 that  
9 the claimant receives from Ms Akselrud," AR 6, the Appeals Council  
10 found that the roommates' decision to divide their market-rate rent  
11 unevenly between them necessarily negated the applicability of the  
12 "business arrangement" exception. For the reasons stated below,  
13 the court finds this interpretation of the regulation to be plainly  
14 erroneous.

15         Third, when computing the amount of ISM plaintiff was  
16 deemed to have received from Akselrud, the Appeals Council appears  
17 to have first computed all of plaintiff's "shelter" costs as  
18 defined in § 416.1130(b) as part of its determination that a  
19 "business arrangement" existed. The plain language of the  
20 regulation, however, asks whether the rent paid is equal to the  
21 current market rental value. See 416.1130(b). Whether the  
22 plaintiff pays an equal share of utilities, while relevant to other  
23 statutory inquiries (see, for example, § 416.1133(c) (including  
24 utilities within the definition of household operating expenses)),  
25 is irrelevant to the question whether, pursuant to the rent-sharing  
26 agreement, plaintiff is paying market-rate rent. The Appeals  
27 Council erred by including utilities in its analysis whether  
28 plaintiff paid rent pursuant to a business arrangement.

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1           In its decision, the Appeals Council acknowledged that  
2 the total rent paid in this case is the "current market value."  
3 The remaining — and as yet unanswered — question is whether the  
4 amount of rent the plaintiff paid pursuant to his agreement with  
5 Akselrud equals the current market rental value of his individual  
6 accommodations within the apartment.

7           Returning to the question of allocating shared rent, the  
8 court finds error in the Appeals Council's implicit legal  
9 conclusion that the "current market rental value" of each  
10 resident's individual accommodations within a shared apartment is  
11 determined by dividing the total rent for the apartment by the  
12 total number of residents. Essentially, the Appeals Council wrote  
13 a new, unwarranted requirement into the regulation: that co-  
14 tenants must divide rent equally or the one paying less will be  
15 deemed to be receiving ISM income. When determining whether a  
16 recipient is receiving ISM income within the meaning of §  
17 416.1130(b), the relevant inquiry is whether the individual is  
18 paying rent equivalent to "current market rental value." The  
19 regulations define the "current market rental value" not as a pro  
20 rata share of total household expenses, but as "the price of an  
21 item on the open market in your locality." 20 CFR § 416.1101.

22           In addition to contradicting the regulation's definition  
23 of the term, the Appeals Council's assumption that the current  
24 market rental value can automatically be equated with the pro rata  
25 share of the total household expenses ignores the reality that  
26 separate accommodations, even within the same apartment, are often  
27 unequal, and as such have differing market values. As plaintiff  
28 points out, it is not uncommon for roommates to pay different rents

1 in acknowledgment of the superiority of one room's view, the fact  
2 that one room has its own bathroom or that one room is bigger than  
3 the other.

4 The facts of the instant case illustrate the error of the  
5 Appeals Council's assumption. Plaintiff and Akselrud share a one-  
6 bedroom apartment. AR at 26. They are not married and there is no  
7 indication in the record that they share the apartment's one  
8 bedroom. It is therefore logical to assume that one roommate's  
9 living situation is inferior to the other's; perhaps one resides in  
10 the bedroom and the other on a couch, and the respective rents paid  
11 by each reflects this. Unfortunately, no factual record was  
12 developed to enable such an inquiry. But neither does the record  
13 suggest, however, that Akselrud had any motivation to bestow  
14 significant financial gifts on plaintiff. Unlike the factual  
15 scenarios in most of the above-cited cases discussing 20 CFR §  
16 416.1130(b), plaintiff and Akselrud are unrelated. Moreover,  
17 plaintiff's testimony at the hearing stating that he had applied  
18 for several subsidized housing situations (AR at 29-30) suggests  
19 that financial considerations predominated in plaintiff's and  
20 Akselrud's decision to share habitations. This scant evidence in  
21 the record points more strongly to the conclusion that plaintiff is  
22 paying the current market rental value of his accommodation than  
23 that Akselrud is subsidizing his housing. There is no evidence in  
24 the record supporting the Appeals Council's assumption that the  
25 rent paid by plaintiff is not "the current market value" of the  
26 accommodations that he rents; rather, the Appeals Council applied  
27 an unwarranted presumption that awkwardly stood in for the missing  
28 substantial evidence necessary to support its decision.

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1                   Nor does the Appeals Council's decision comport with the  
2 aims of Title XVI. The Ninth Circuit upheld the SSA's ISM  
3 regulation as "reasonably related to the purposes of the enabling  
4 legislation," Title XVI, because they tend to "equalize the status  
5 of SSI recipients who live in quarters owned by friends or  
6 relatives, paying little or no rent, and those who must obtain  
7 housing in the marketplace." Antonioli, 624 F2d 78 (9th Cir  
8 1980). The controlling factor underlying the court's opinion,  
9 however, was fairness to participants in the program. In the  
10 instant case, the SSA appears, contrary to the intent of Title XVI,  
11 to have placed its own administrative convenience ahead of fairness  
12 to SSI recipients.

13                   What the Appeals Council has done is to adopt a short-cut  
14 to determining the existence of ISM income that both works to the  
15 disadvantage of SSI recipients and avoids making the inquiry as  
16 required by the regulation into whether the claimant's rent fairly  
17 represents the "current market rental value" of the claimant's  
18 accommodation. This short-cut is supported neither by substantial  
19 evidence in the record nor by the plain language of the regulations  
20 and their enabling statute. Unless the SSA determines that  
21 plaintiff's smaller portion of the rent paid on his shared  
22 accommodation is less than the "current market rental value" of his  
23 individual accommodations, the SSA may not deem the discrepancy to  
24 be ISM income.

## IV

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27                   The record does not make it possible to make a finding  
28 regarding the dispositive issue on this appeal: whether the rent

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1 paid by plaintiff pursuant to his agreement with Akselrud reflected  
2 the current market value of his individual accommodations. The  
3 ALJ's finding that \$500 per month was consistent with listings in  
4 the local paper advertising rooms for rent (AR 16) is helpful, but  
5 does not constitute substantial evidence in the record.

6           If further development of the record discloses that  
7 plaintiff's rent payment reflected the current market value of his  
8 accommodations, then the SSA must conclude that plaintiff was  
9 "paying the amount charged under a business arrangement" with  
10 Akselrud within the meaning of 20 CFR § 416.1130(b) and must  
11 restore the withheld benefits. If not, then some portion of the  
12 discrepancy may be considered ISM and deducted from plaintiff's  
13 benefits. In neither event is it appropriate for the SSA for mere  
14 reasons of convenience to presume, without the support of  
15 substantial evidence in the record, that the fair market value of  
16 an individual claimant's share of a shared accommodation is an  
17 equal portion of the total rent.

18           This matter is remanded to the SSA for further  
19 proceedings in accordance with this decision. The clerk is  
20 directed to close the file and terminate all pending motions.

21

22           IT IS SO ORDERED.

23             
24

25           VAUGHN R WALKER  
26           United States District Chief Judge  
27  
28